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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 34

STEWART L. UDALL, SECRETARY OF THE INTERIOR, PETITIONER

v.

JAMES K. TALLMAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The decision of the Secretary of the Interior is reported at 68 I.D. 256. The opinion of the court of appeals (R. 82–95) is reported at 324 F. 2d 411.

JURISDICTION

The judgment of the court of appeals was entered September 19, 1963 (R. 96). A timely petition for rehearing was denied October 16, 1963 (R. 99). On January 11, 1964, the Chief Justice extended the time for filing a petition for certiorari to February 6, 1964 (R. 111). The petition for a writ of certiorari was filed on February 6, 1964, and granted on March

30, 1964 (R. 111; 376 U.S. 961). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Executive Order No. 8979 (6 F.R. 6471), providing that none of the lands in a described area "shall be subject to settlement, location, sale, or entry, or other disposition * * * under any of the public-land laws," closed the lands to leasing under the Mineral Leasing Act of 1920 (30 U.S.C. 181 *et seq.*) and made invalid oil and gas leases thereafter issued by the Secretary of the Interior on applications filed while the order was outstanding.

2. Whether the Secretary of the Interior's Public Land Order No. 487 (13 F.R. 3462), withdrawing lands "from settlement, location, sale or entry," closed the lands to mineral leasing and made invalid oil and gas leases thereafter issued by the Secretary on applications filed while that order was outstanding.[1]

STATUTES, REGULATIONS, AND ORDERS INVOLVED

Sections 1 and 17 of the Mineral Leasing Act of 1920 (41 Stat. 437, 443, as amended, 30 U.S.C. 181, 226); Executive Order No. 8979, 6 F.R. 6471; § 192.9 of the Regulations of the Department of Interior (43 C.F.R. 192.9), as in force from time to time (12 F.R. 7334; 20 F.R. 9009; and 23 F.R. 227); and an order of the

[1] There is also latent in the case the following question (see pp. 31–35, *infra*):

Whether the holder of an oil and gas lease issued by the Secretary is an indispensable party to an action by a subsequent applicant to compel the Secretary to issue a lease to him on the ground that the lease first issued was invalid.

Secretary of Interior issued on August 2, 1958 (23 F.R. 5883) are set forth in pertinent part in Appendix A, pp. 1a–10a, *infra*.

Further orders relevant only to respondent Coyle's claim (Public Land Order No. 487, 13 F.R. 3462; and Public Land Order No. 1212, 20 F.R. 6795, 7904) are set forth separately in Appendix B, pp. 11a–15a, *infra*.

STATEMENT

Between October 15, 1954, and January 28, 1955, D. J. Griffin and other persons filed applications for oil and gas leases on some 25,000 acres of the public domain located within the Kenai National Moose Range in Alaska (R. 38). On August 14, 1958, the respondents filed offers to lease the same lands (R. 38). Acting pursuant to Section 17 of the Mineral Leasing Act of 1920 (App. 1a–2a), which requires leases on lands not within a known geologic structure to be given to the qualified persons "first making application," the Bureau of Land Management of the Department of the Interior issued leases on the tracts, effective September 1, 1958, to the Griffin group of applicants (R. 38). In October 1959, when they were reached for processing, the respondents' applications were rejected on the ground that the lands had been leased to prior applicants (R. 38).

From the rejection of their applications, the respondents appealed to the Director of the Bureau of Land Management (R. 27–36) and then to the Secretary of the Interior (R. 37–45, 71), both of whom affirmed the decision. Respondents thereafter brought this action in the nature of mandamus to compel the Secretary to issue oil and gas leases to them (R.

3–10). The Griffin group, to whom leases on the same lands had previously been issued, were not made parties to the action.

The district court granted summary judgment in favor of the Secretary dismissing the complaint (R. 79–80). The court of appeals reversed (R. 82–95). It held that the Executive Order by which the Moose Range had been created in 1941 (Exec. Order No. 8979, App. 2a) had withdrawn the lands from availability for leasing under the Mineral Leasing Act; that they were not reopened for leasing until August 14, 1958 (as a consequence of a revised departmental regulation); that the applications of the Griffin group, filed while the lands were "closed" to leasing, were ineffective; that the leases granted to them were nullities; and that the respondents, as the persons "first" making application for leases after the lands became available for leasing in 1958, were accordingly entitled to be issued leases on their applications.[2]

SUMMARY OF ARGUMENT

I

Executive Order No. 8979 of December 16, 1941, creating the Kenai National Moose Reserve in Alaska, did not, in withdrawing the land from "settlement, location, sale, or entry, or other disposition" close the range to leasing under the Mineral Leasing Act. By its own terms the Order relates only to dispositions of

[2] As to the application by respondent Coyle, the decision was based on Public Land Order No. 487 rather than the 1941 Executive Order. See pp. 28–31, *infra*.

the land and specifically to forms of disposition whereby private persons would obtain fee patents to the land. When oil and gas leases are issued under the Mineral Leasing Act, the land retains its character as public land subject to the management and control of the Secretary of the Interior. In many instances (such as here) oil and gas development is not inconsistent with the purposes for which withdrawals are made. Moreover, because the Secretary retains his discretion to lease or not, the purposes for which the withdrawals are made can be protected. Accordingly, unless the Mineral Leasing Act is specifically mentioned in a withdrawal from disposition it remains applicable.

The Secretary has long and consistently so construed this and similar withdrawal orders and has made regulations and issued leases based on this construction. Since he is entrusted with management and operation of the public lands and the execution of statutes, orders, and regulations pertaining thereto, his construction may not be set aside in a mandamus proceeding such as this unless his action can be characterized as arbitrary and capricious. In the instant case his construction at the very least is reasonable and should not be set aside.

Relying on the consistent and long-standing interpretation and practice of the Secretary, many individuals have applied for and received leases on the Moose Reserve. Many of those leases have been developed at substantial expense to the lessees and at present are producing large quantities of gas and oil. Individuals wishing to develop the resources of the

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public lands must operate within the framework established by the Secretary of the Interior. When large investments have been made to establish rights based upon the consistent interpretation and practice of the Secretary, such rights should not be upset by retroactively overturning the interpretation and practices of the Secretary.

The long-standing interpretation and practices of the Secretary, the leases issued on the Kenai Moose Reserve, and the fact that oil had been discovered, were all specifically called to the attention of and received the approval of Congress. Certainly such approval constitutes legislative ratification of the Secretary's interpretation and practice in a field within the scope of the legislative and executive province, which may not be set aside by the courts.

Lending more weight to all of the foregoing is the fact that there is not here involved the question of the Secretary's power. Although the 1941 Order was issued by the President, the authority to modify it was soon transferred to the Secretary of the Interior. Had the Secretary interpreted the Order as did the court of appeals, or known that the court would so interpret it, he could easily have amended the Order and issued the oil and gas leases in exactly the same fashion. Surely a disagreement as to form rather than substance does not justify overturning the consistent practice of the Secretary, approved by Congress, reliance upon which has resulted in large expenditures by innocent third parties.

II

If Executive Order 8979 did not bar mineral leasing, *a fortiori* Public Land Order No. 487 (applicable to the lands sought to be leased by respondent Coyle) did not. That order withdrew the lands only from "settlement, location, sale or entry"—none of which terms includes mineral leasing—and did not include the "other disposition" language relied upon by the court below in its construction of Executive Order 8979.

III

The question whether the lessees were indispensable parties to this action, sought to be aruged by the *amici curiae,* was not raised by the Secretary in the lower courts and is not urged here as a ground for reversal. Moreover, because the respondents' claim is in any event without merit and because of the great public interest in removing the doubts created by the decision below as to the validity of the oil and gas leases in the Kenai Moose Range, we urge the Court to reverse the judgment on the merits without passing on the indispensable-parties question argued by the *amici.*

ARGUMENT

I

EXECUTIVE ORDER NO. 8979 DID NOT CLOSE THE KENAI MOOSE RANGE TO LEASING UNDER THE MINERAL LEASING ACT

The Kenai National Moose Range was created in 1941 by Executive Order No. 8979 (App. 2a–3a),[3] by which some two million acres of the public domain were set aside "as a refuge and breeding ground for moose." The order provided that:

> None of the above-described lands excepting [a defined area] * * * shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, * * *.

The leases in conflict with the applications of nine of the ten respondents were within the area to which that provision applied and were issued on applications filed while the Executive Order was in effect. As to those nine respondents, therefore, the question is whether the quoted provision of the Executive Order closed the lands to leasing under the Mineral Leasing Act of 1920 and made the leases so issued invalid. That question will be considered in this Point. The leases in conflict with respondent Coyle's application

[3] The President has inherent power to effect such withdrawals. *United States* v. *Midwest Oil Co.*, 236 U.S. 459. The power was confirmed in part, though not limited, by the so-called Pickett Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. 141–142. The Kenai Range order did not expressly invoke the Pickett Act.

were on land within the area excepted from Executive Order 8979,[4] and his suit thus presents a different question which will be separately considered in Point II.

A. THE TERMS OF THE EXECUTIVE ORDER DID NOT FORBID MINERAL LEASING

Ever since the adoption of the Mineral Leasing Act in 1920, the Department has consistently characterized oil and gas leasing under that Act as not effecting a disposition of land. It has accordingly held[5] that an order withdrawing lands from availability for private appropriation does not bar mineral leasing unless it specifically so provides.[6] As stated by the leading treatise on the topic in 1951, well before the events involved in this case:

> * * * Ordinarily, a withdrawal from sale or other disposition of the public domain is no bar to the issuance of a lease, as leasing is not dis-

[4] References to Executive Order 8979 are to the provision quoted above forbidding settlement, etc., in the specified area, not to the provisions—applicable to a larger area—creating the Moose Range, the latter provisions being of no significance for purposes of this case.

[5] See, *e.g.*, *Opinion of the Solicitor*, 48 I.D. 459 (1921) ("reserved from entry, location, or other disposal"); *Noel Teuscher*, 62 I.D. 210 (1955) ("withdrawn from settlement, location, sale, or entry"); *Opinion of the Solicitor*, 55 I.D. 205, 211 (1953) ("temporarily withdrawn from settlement, location, sale, or entry, and reserved for classification").

[6] The Secretary may, of course, conclude that the purpose of a particular withdrawal would be impaired by leasing and for that reason decline to issue leases in the exercise of his discretion. See, *e.g.*, *Earl J. Boehme*, 62 I.D. 9 (1955); *Haley* v. *Seaton*, 281 F. 2d 620 (C.A.D.C.).

> posing of the land. It is merely granting the right to prospect and, upon discovery, to produce oil or gas from the land under prescribed conditions. Title to the land and the minerals therein remain in the United States. * * *

The characterization of oil and gas leasing as not effecting a "disposition" of land for purposes of withdrawal orders is supported by a variety of considerations. In the first place, the interests created by an oil and gas lease under the Act are very limited, consisting essentially of but a right to prospect for oil and gas and then to produce from wells located on the land whatever oil and gas is discovered.[8] The leasehold interests are quite unlike mining locations, for example, which eventuate in the securing of a fee patent. In the second place—and with peculiar significance in the light of the function of a withdrawal order—oil and gas leasing, unlike outright dispositions of land, is not usually inconsistent with the reservation of lands primarily for other purposes.[9] Finally, in contrast to private appropriation

[7] Hoffman, *Oil and Gas Leasing on the Public Domain* (1951), pp. 33–34. Mr. Hoffman was the Chief of the Branch of Minerals of the Bureau of Land Management.

[8] For the limited nature even of that right, see *Boesche* v. *Udall*, 373 U.S. 472, 477–478.

[9] That view is reflected in the Mineral Leasing Act itself, which by its own terms was made fully applicable to lands previously withdrawn for wildlife conservation or other purposes. See Section 1, App. 1a. It is further reflected in the Mineral Leasing Act for Acquired Lands, 61 Stat. 913, 30 U.S.C. 351, providing for oil and gas leasing on lands acquired by various agencies insofar as such leasing would not be inconsistent with the public purposes for which the land was acquired.

of the public domain by settlement, entry or location—in which rights are acquired by autonomous private action (*e.g.*, staking out a location, making a homestead entry, etc.)—the issuance of oil and gas leases always remains subject to the Secretary's discretion. While formal withdrawal of the lands from settlement and the like is essential to prevent rights from being acquired by "adverse" private action, the regulation of oil and gas leasing—to whatever extent is necessary or desirable to prevent interference with the purposes of the withdrawal—can be left to the Secretary's discretion, exercised by regulation or individual determinations, when appropriate. Seen in the light of those considerations and with an appreciation of the basic function of withdrawal orders, the Secretary's interpretation of Executive Order 8979 was, we submit, not only textually permissible but required.

But whether the Secretary's reading of the Executive Order is abstractly the "correct" interpretation is beside the point. The Secretary of the Interior is the officer charged with the administration of the public lands, and it is for him, and not the courts, to say in the first instance what the Order means. So long as there is a reasonable basis for his action and he has not acted capriciously or arbitrarily, the courts may not interfere. See, *e.g.*, *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143, 153–154; *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125; *Gray* v. *Powell*, 314 U.S. 402: *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194.

B. SUBSTANTIALLY THE ENTIRE MOOSE RANGE HAS BEEN LEASED ON THE PREMISE THAT THE EXECUTIVE ORDER PERMITTED LEASING AND PRIVATE RIGHTS OF GREAT VALUE HAVE BECOME VESTED IN RELIANCE ON THE SECRETARY'S INTERPRETATION OF THE ORDER

The Department has consistently administered the area subject to Executive Order 8979 on the premise that the Order did not close the area to oil and gas leasing. One lease in the area was issued as early as 1953—five years before respondents had even filed their applications—and by 1957 a total of 36 leases covering 74,986 acres had been issued.[10]

Offers covering most of the rest of the area subject to Executive Order 8979 had also been accepted for filing, and initially processed, during the same period. For reasons explained below (pp. 19–24), however, final action on the offers had been suspended pending the issuance of revised regulations imposing new restrictions on oil and gas leasing in wildlife refuges. The regulations were issued on January 8, 1958 (App. 5a–9a), and an implementing order specifically applicable to the Kenai Range was issued on August 2, 1958 (App. 9a–10a). Their effect was to forbid mineral leasing altogether in the southern half of the Range and to require new restrictions to be included in leases issued in the northern half. Promptly after their issuance, the pending applications were acted upon and 302 leases covering 663,281 acres were issued in the area subject to Executive Order 8979, among them being the leases issued to the Griffin group and held invalid by the court below.

[10] The leasing data summarized here is based on a survey of the records of the Anchorage land office.

In the area subject to Executive Order 8979, therefore, the Secretary has issued a total of 338 leases covering 738,267 acres on applications filed prior to 1958 [11]—*i.e.*, during the period respondents contend, and the court of appeals held, the area was closed to leasing. The area so leased constitutes substantially the whole of the 1941 withdrawal on which leasing was not forbidden by the 1958 regulations. In short, the Secretary had substantially *completed* the leasing of the entire area involved well before this suit, questioning for the first time his authority to issue such leases, was even begun.

The lessees (and their assignees) have in turn expended large sums, of the magnitude of tens of millions of dollars, in the development of the leases thus issued. A major oil strike was made in 1957 in the Swanson River Unit—located entirely in the area allegedly "closed" to leasing by Executive Order 8979—and other discoveries have since been made. The production to date has already been substantial (in the magnitude, again, of tens of millions of dollars), and the Geological Survey of the Department of Interior estimates that the proven reserves of oil and gas subject to the leases have a value ranging from $750 million to over $1 billion.[12]

[11] The figures given here, it should be emphasized, are limited to the leases issued in the area withdrawn from settlement by Executive Order 8979. Unlike the figures given in the petition (Pet. 10–11), they do *not* include the leases issued in the part of the Moose Range excepted from the Executive Order's withdrawal provisions.

[12] Those estimates include some reserves in the area excepted from Executive Order 8979 (the status of which is discussed

The reasons for not disturbing an administrative construction that has been so extensively implemented and relied upon in the conduct of the public business are manifest. As this Court said in *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 472–473:

> It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, lawmakers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.

Here, as in *McLaren* v. *Fleischer*, 256 U.S. 477, 481, the construction was adopted "before the present controversy arose or was thought of * * *, [m]any outstanding titles are based upon it and much can be said in support of it." What is involved is not simply an abstract principle of deference to the greater expertize of an administrative agency but the security of the title of hundreds of persons who have dealt with the agency in reliance upon its interpretation of its own regulations. In such circumstances, we sub-

in Point II, *infra*), but by far the larger part of the proven reserves are within the area subject to that Order (primarily, the Swanson River field).

mit, only the grossest abuse of power could justify a court in rejecting the administrative construction and declaring invalid the long course of action based upon it.

C. THE LEASING PRACTICES FOLLOWED IN THE AREA SUBJECT TO THE EXECUTIVE ORDER HAVE BEEN APPROVED BY CONGRESS

In early 1956, the appropriate committees of Congress had under consideration proposals to restrict mineral leasing in wildlife refuges. During the hearings, representatives of the Department advised the committees, *inter alia,* of the leases that had been issued in the Kenai Moose Range.[13] No question was raised as to the power of the Secretary to issue such leases and the only issue was whether the power should be restricted by statute.[14] Neither committee favorably reported the bills. Instead, the House Committee submitted a report reciting an interim arrangement

[13] Hearings before the House Committee on Merchant Marine and Fisheries on H.R. 5306, etc., 84th Cong., 2d Sess., pp. 135, 141, 147; Hearings before the Subcommittee on Merchant Marine and Fisheries of the Senate Committee on Interstate and Foreign Commerce on S. 2101, 84th Cong., 2d Sess., pp. 92–98.

[14] The bill as introduced only forbade the Secretary to "dispose of" lands in wildlife refuges, and a question arose in the hearings whether that language would apply to the issuance of oil and gas leases. The Department representatives asserted, without contradiction, that a granting of an oil and gas lease was not a "disposition" and would not be affected by the language as it stood. An amendment was accordingly proposed specifically restricting oil and gas leasing. See Hearings before the House Committee on Merchant Marine and Fisheries on H.R. 5306, etc., 84th Cong., 2d Sess., p. 98; Hearings before the Subcommittee on Merchant Marine and Fisheries of the Senate Committee on Interstate and Foreign Commerce on S. 2101, 84th Cong., 2d Sess., pp. 66–70.

that had been agreed upon under which the Secretary would submit to the Committee for its advance approval or disapproval any proposed leasings in wildlife refuges. H. Rep. No. 1941, 84th Cong., 2d Sess., pp. 12–13.

On June 29, 1956, pursuant to the agreement, the Department submitted to the House Committee on Merchant Marine and Fisheries a proposal to issue 30 leases covering 71,680 acres in the area withdrawn by Executive Order 8979, to be operated as the Swanson River Unit. After a public hearing, the Chairman of the Committee, by letter dated July 25, 1956, advised the Department that the Committee was in unanimous agreement that the leases would not be detrimental to wildlife uses and should be issued.[15] The leases were then issued and it was under them that the first discovery of oil (in July 1957) in the Kenai Range was made.[16] In approving the issuance of those leases, the Committee necessarily agreed that Executive Order 8979 did not bar mineral leasing.

Congressional approval of the leasing activities in the Kenai Range was not limited to informal committee advice and legislative inaction. The "Alaska Submerged Lands Act" of July 3, 1958, 72 Stat. 322, authorized for the first time the granting of oil and gas

[15] Letter dated July 25, 1956, Chairman Bonner, Committee on Merchant Marine and Fisheries to Director, Fish and Wildlife Service, attached to Department of the Interior Press Release, January 8, 1958.

[16] The discovery and the leasing activities were, of course, also reported to the President. Annual Report of the Secretary of the Interior, 1957, pp. 279, 356; id., 1958, pp. 104, 199, 258, 321.

leases on inland navigable waters in Alaska. Section 6 gave existing lessees (and those with pending offers) a preference right to have their leases (or applications) expanded to include any navigable waters within their boundaries. The history of that provision shows that one of the specific purposes was to protect the holders of producing leases in the Kenai Range (*i.e.*, the leases granted in 1956 in which oil had been discovered in 1957) against leases being given to other persons on navigable waters overlying the oil and gas deposits that had been discovered and developed by them. It was adopted with full knowledge of the leasing activities that had taken place in the Kenai Range and of the intention of the Department to continue issuing leases on the large number of pending applications,[17] and the committee report expressly referred to the producing leases on the Kenai Range (the most important producing leases in Alaska) as among those meant to be augmented by the inclusion of navigable waters.[18] Thus, Congress not only regarded the outstanding leases as validly issued but, acting on that belief, provided for their enlargement in protection of the leaseholders' interest. "Such a record constitutes ratification of administrative construction, and confirmation and approval" of the Secretary's consistent practice based upon his interpretation of the 1941 Executive Order. *Ivanhoe Irrig. Dist.* v. *McCracken,* 357 U.S. 275, 293; *Boesche* v. *Udall,* 373 U.S. 472, 483; *City of Fresno* v.

[17] See Hearings before the Senate Committee on Interior and Insular Affairs on H.R. 8054, 85th Cong., 2d Sess., pp. 19–20, 24–25, 32, 76–77, 93–94; 104 Cong. Rec. 11836–11838.

[18] S. Rep. No. 1720, 85th Cong., 2d Sess., pp. 3, 5–6.

California, 372 U.S. 627; *Fleming* v. *Mohawk Co.*, 331 U.S. 111, 116, 119; *Brooks* v. *Dewar*, 313 U.S. 354, 361.

D. THE REGULATIONS AND RELATED DEPARTMENTAL ORDERS ARE FULLY CONSISTENT WITH AND CONFIRM THE INTERPRETATION OF THE EXECUTIVE ORDER AS NOT BARRING MINERAL LEASING

Even when withdrawn lands remain subject to leasing under the withdrawal orders, it is established that the Secretary has discretion to decline to issue leases, or to impose conditions on them, when necessary to prevent interference with the purposes for which the withdrawal was made.[19] The regulations establishing the leasing policies to be followed in wildlife refuges are an exercise of that power. Starting with the basic "multiple-use" policy followed by the Department in the administration of the public lands, they seek, by appropriately limiting or conditioning the grant of leases in wildlife refuges, to accommodate the two ends of protecting wildlife while fostering mineral development. The advocates of development and the advocates of conservation have, needless to say, differing views about how the balance is to be struck, and the development of the regulations, with the interim "suspensions" of final action on pending lease applications, reflects simply the continuing process of accommodating the opposing interests.

The regulation specifically governing oil and gas leasing in wildlife refuges (43 C.F.R. 192.9) was first adopted in 1947. In its original form (App. 3a), it provided simply that leases in wildlife refuges must

[19] E.g., *Haley* v. *Seaton*, 281 F. 2d 620 (C.A.D.C.).

be subject to an approved unit plan and must require the advance consent of the Secretary to any drilling or prospecting. On August 31, 1953, the Director of the Bureau of Land Management advised all regional administrators that "a possible revision of policy and regulations" on leasing in wildlife refuges was being studied and directed them in the meantime to "suspend action on all pending oil and gas lease offers" within such refuges. The direction was given by an internal, unpublished, memorandum and amounted simply to instructions given to subordinates on the action to be taken by them pending further advice. It in no way purported to, or did, prevent the issuance of leases with the approval of the national office, and leases on a number of different refuges (including the Kenai Range) were in fact issued during the so-called "suspension" period.[20] *A fortiori,* the unpublished memorandum in no way prevented the continued filing of lease offers on lands otherwise available for leasing.[21] It was during this period that the Griffin applicants filed their offers.

[20] See p. 12, *supra;* Hearings before the Subcommittee on Merchant Marine and Fisheries of the Senate Committee on Interstate and Foreign Commerce on S. 2101, 84th Cong., 2d Sess., pp. 92–93; Hearings before the House Committee on Merchant Marine and Fisheries on H.R. 5306, etc., 84th Cong. 2d Sess., pp. 142–146; 102 Cong. Rec. A6581–6583 (August 20, 1956).

[21] That was made explicit in a subsequent memorandum from the Bureau to an Area Administrator, advising him that the 1953 memorandum did not "prevent the filing of new offers" and that all pending applications would "preserve their priority." BLM memorandum to Area Administrator, Area 4, August 12, 1955.

On December 8, 1955, the anticipated revision of the refuge-leasing regulation was promulgated. The new regulation (App. 3a–5a) was much more restrictive and gave increased power to the Fish and Wildlife Service to regulate or veto refuge mineral development. It listed in an Appendix A a number of refuges (not including Kenai) in which no leasing at all would be permitted because of their importance to the preservation of rare species of plant or animal life. It then listed in Appendix B certain areas (including a small part of the Kenai Range) in which the Fish and Wildlife Service had determined that leasing, unless closely regulated, would jeopardize conservation purposes. In such areas, leasing was to be permitted only upon the approval by the Director of the Service of a "complete and detailed operating program for the area." In all other wildlife areas, the regulation provided, "Oil and gas leases may be issued" provided they contained specified conditions requiring approval by the Service of the type of prospecting conducted and requiring adoption of a unit plan approved by the Service. The main significance of the 1955 regulation for present purposes is that, by expressly including a part of the Kenai Range in the areas available for leasing only upon approval of a detailed operating plan and by impliedly including the rest of the Range in the third category, it necessarily assumed and confirmed the preexisting availability of the Range for leasing under the 1941 withdrawal order.

The 1955 regulation had the effect of terminating the prior "suspension" of leasing that had been di-

rected pending its adoption. However, upon the almost immediate introduction in Congress of bills further to restrict leasing in wildlife refuges, upon which hearings were begun in January and February 1956,[22] the field offices were directed to continue to withhold final action on lease applications,[23] and study of the leasing policy was resumed. Once again, of course, the "suspension" consisted simply of operating instructions to subordinates and, with appropriate internal (and sometimes Congressional[24]) approval, a significant number of leases on refuge lands (including Kenai) continued to be issued.

The final result of the controversy over the leasing policies to be followed in wildlife refuges was the adoption, on January 8, 1958, of a second complete revision of the regulation. The new regulation (App. 5a–9a) was a major victory for the conservationists. It prohibited oil and gas leasing in most wildlife refuges altogether,[25] giving "sole and complete" jurisdiction over them to the Fish and Wildlife Service. The only exceptions (as to exclusively federal lands) were (1) lands withdrawn for a dual purpose (grazing and forage as well as wildlife conservation) and (2) wild-

[22] See Hearings cited in note 20, *supra*.

[23] Short-term interim suspensions were first directed by various interdepartmental communications. Then on March 30, 1956, the Bureau of Land Management by teletype directed that the suspension be continued until further notice, explaining that "This does not suspend all preliminary action which should continue to be taken. The suspension applies only to final actions in such matters."

[24] See pp. 15–16, *supra;* H. Rep. No. 1941, 84th Cong., 2d Sess., pp. 12–13.

[25] Unless leasing was necessary to prevent draining, 43 C.F.R. 192.9(b)(2).

life refuges in Alaska. As to such lands, moreover, the Bureau of Land Management and the Fish and Wildlife Service were to reach agreements specifying the areas which "shall not be subject to oil and gas leasing" and the stipulations required to be included in leases issued on the remaining areas. The agreements were to become effective upon approval by the Secretary and publication in the Federal Register. The regulation further provided that "Lease offers for such lands will not be accepted for filing [*i.e.*, new lease offers] until the tenth day after the agreements * * * are noted on the land office records" and that "All pending offers or applications heretofore filed * * * will continue to be suspended until" the conclusion of the agreements.

Pursuant to the regulation, there was published in the Federal Register on August 2, 1958, an order of the Secretary announcing the agreement reached with respect to the Kenai Moose Range (App. 9a–10a). The order decreed that certain lands within the Range (essentially, the southern half) "are hereby closed to oil and gas leasing because such activities would be incompatible with management thereof for wildlife purposes." It then provided:

> The balance of the lands within the Kenai National Moose Range are subject to the filing of oil and gas lease offers * * *. Offers to lease covering any of these lands which have been pending and upon which action was suspended in accordance with the regulation * * * will now be acted upon and adjudicated in accordance with the regulations.

> * * * lease offers for lands which have not been excluded from leasing will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office * * *.[26]

The agreement was noted in the Anchorage land office on August 4, 1958, and the respondents filed their applications on the tenth day after that, August 14, 1958.[27] Shortly after the order was issued, the Department, as announced, began processing the already-pending offers that had previously been suspended. Effective September 1, 1958, it granted leases on the lands in suit to the Griffin applicants on the basis of their offers that had been pending since January 1955. When in due course the new offers filed on August 14, 1958, were reached for ajudication, the re-

[26] The Secretary recognized that most of the area had already been filed upon and that in fact there would be little left available for new applicants. In announcing the order, he said: "Most of these lands are now covered by applications that will be ajudicated under the regulations of the Department." Department of Interior Press Release, July 25, 1958.

[27] The order, to avoid a race to the land office, provided that all offers filed within ten days after filing was permitted (*i.e.*, during August 14–24) would be treated "as having been filed simultaneously." Under the regulations, priority as among simultaneously-filed offers is to be determined by a drawing. 43 C.F.R. 295.8. In the drawing later conducted among the offers filed during the period August 14–24, the respondents' applications were the first drawn covering the land in suit, and they accordingly acquired a priority date as of August 14, 1958, and ahead of any other offers filed during that period. Their applications remained, of course, junior to any valid applications that had been previously filed and were already pending.

spondents' offers were, as noted in the Statement, rejected on the grounds of the prior leasing.[28]

From the terms and evolution of the regulations, it is evident that they have consistently taken as their premise that the wildlife refuges to which they applied—specifically including the Kenai Moose Range—were fully subject to mineral leasing under the withdrawal orders by which they were created. Their province has been to *restrict* the leasing activities otherwise permissible, with each version of the regulations prohibiting leasing altogether on larger and larger areas of refuge lands. For the court of appeals to hold, as it did, that the 1958 revision of the regulation (and the implementing order of August 2, 1958) "opened" the northern half of the Moose Range to leasing for the first time is thus a remarkable inversion: what the 1958 regulation and order did was, not to *open* the northern half of the Range, but to *close* the southern half.

The real significance of the regulations lies simply in their confirmation that the Department has from

[28] The circumstance that the lands had already been leased before the drawing was held among the offers "simultaneously" filed on August 14–24, 1958 (see note 27, *supra*), apparently thought bizarre by the court of appeals, is not unusual. Lease offers are processed in the order of filing and leases are issued as soon as an acceptable offer is reached. The pending lease offers were therefore acted upon before there was any occasion to examine the offers filed after August 14, 1958. The only purpose of the drawing later held, in turn, was to establish the order in which the offers "simultaneously" filed on August 14–24 would be processed. They could hardly have been processed (to see whether they conflicted with previously-issued leases) before the order of processing was established (*i.e.*, before the drawing).

the beginning construed Executive Order 8979 as not barring mineral leasing and has acted consistently with that construction throughout the period involved here. The 1955 regulation confirmed that understanding by its express mention of the Kenai Range, and the 1958 regulation (and its implementing order) even more pointedly confirmed it by specifically directing the resumption of processing of lease offers previously filed on the Kenai Moose Range. The regulation constitutes, in short, a formal reaffirmation of the consistent administrative construction—repeatedly acted upon by the Department, repeatedly relied upon by the lessees, and repeatedly endorsed by Congress—that Executive Order 8979 did not forbid mineral leasing.

E. SINCE THE SECRETARY HAD POWER TO MODIFY THE EXECUTIVE ORDER, THE DEFECT IS AT BEST ONE OF FORM BY WHICH NO SUBSTANTIAL RIGHTS HAVE BEEN PREJUDICED

What has thus far been said would be controlling even if the question in this case went to a statutory or other limitation on the Secretary's power. In fact, the question here goes only to a matter of form. Admittedly, no statutory limitation is involved. And, while the 1941 withdrawal order was issued by the President, thus suggesting the presence of Presidentially imposed limitations, the President soon completely rid himself of the function and delegated to the Secretary the full power to withdraw lands or to modify or revoke any existing withdrawals.[29] With

[29] Executive Order No. 10355 (17 Fed. Reg. 4831), issued in 1952, delegated to the Secretary authority, by public land orders, "to withdraw or reserve lands of the public domain

that delegation of functions, the Secretary acquired plenary power over the status of the Range, and the 1941 Executive Order became, for all practical purposes, the Secretary's own order.

The question, then, is not one of power at all, but solely one of the Secretary's interpretation of his own order—that is to say, of words he had the power to change at will. No interests had become vested in reliance upon some other meaning of the words, and the Secretary's construction of them was of long standing, was open and notorious, was acquiesced in by Congress, was reflected in the regulations, was acted upon repeatedly, and was relied upon by innocent lessees in the investment of millions of dollars. Had the Secretary been able to foresee the court of appeals' ruling, he could readily have modified the order prior to the events in question to remove any doubt. He did not, only because to him its meaning was clear. In those circumstances, we submit, the construction followed by the Secretary in practice became a controlling gloss on the words. The Secretary had and in fact exercised the power to lease the Range during 1953–1957, and his alleged misuse of words in doing so, by which no rights were prejudiced, is simply beside the point. And surely a grammatical "error" by the Secretary in construing words he has the power to change, affecting no other

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and other lands owned or controlled by the United States in the continental United States or Alaska for public purposes, including the authority to modify or revoke withdrawals and reservations of such lands heretofore or hereafter made." That order replaced a somewhat more limited delegation made in 1943. See Executive Order No. 9337, 8 Fed. Reg. 5516.

substantial interests, cannot justify sacrificing the vested rights acquired by hundreds of innocent persons in reliance on his construction.

There have been few occasions, we submit, in which a court has invalidated so extensive a course of administrative action and caused so serious a dislocation of vested rights with so little justification. There is but one fact which makes the court of appeals' decision understandable: in originally deciding the case, it was wholly uninformed—indeed, misinformed—as to the leasing and development that had taken place in the Range. The respondents' brief in the court of appeals stated as a fact that "No leases issued for any lands within the Kenai Range between 1941 and 1958" (Br. 30) and, with equal certitude, that "the discovery of oil on the Kenai Peninsula in July of 1957" and the resulting "increased activity" in the filing of lease applications "were in areas of the Peninsula outside of the Kenai National Moose Range" (Br. 40). Those erroneous statements [30] were unfortunately not corrected by the government's brief, and the court of appeals proceeded to decide the case under a serious misapprehension as to facts of the greatest significance. The court of appeals' failure to accord proper respect to the administrative practice was thus attributable to the

[30] If a concession be needed to establish a geographic fact, it may be found in the Brief in Opposition (pp. 8, 14–15), where respondents admit that the Swanson River Unit, leased in 1956 and on which the July 1957 oil discovery was made, was located in the area withdrawn from settlement by Executive Order 8979 and offer a wholly different (but equally erroneous, see Reply Br. 2–5) explanation for the leasing.

simple fact that it did not know about the practice.[31] Once the facts are known and appreciated, respondents' whole case—at best, a quibble over the use of words—collapses.

II

PUBLIC LAND ORDER NO. 487 DID NOT BAR MINERAL LEASING IN THE AREA TO WHICH IT APPLIED

Alone among the ten lease applications involved in this case, respondent Coyle's application was on land located in the part of the Moose Range which was excepted from Executive Order 8979. Most of the area so excepted, however, including the lands filed on by respondent Coyle, was subsequently withdrawn from settlement by Public Land Order No. 487 (App. 11a), and order issued by the Secretary of Interior in 1948. Public Land Order 487 provided that:

> * * * the public lands within the following-described areas are hereby temporarily withdrawn from settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation: * * *.

That order was revoked on September 9, 1955, by Public Land Order No. 1212 (App. 11a–14a), but the leases in conflict with respondent Coyle's application were issued (in 1958) on applications filed while the order was outstanding. The issue raised by re-

[31] In connection with the petition for rehearing and the motion for reconsideration, the court was told of the extensive leasing and development that had taken place, but the correction apparently came too late, for the court refused to reconsider the case.

spondent Coyle, therefore, is whether Public Land Order 487 closed the area to which it applied to mineral leasing, rendering invalid any applications filed while it was outstanding. That question differs from that of the effect of Executive Order 8979, discussed in Point I, in only two respects, and the discussion may accordingly be limited to those two points of difference.

1. The first difference is in the language of the two orders. Since Public Land Order 487 did not contain the "other disposition" language relied upon by the court below in interpreting Executive Order 8979—and since the granting of an oil and gas lease is plainly not a "settlement," a "location," a "sale," or an "entry"—there is even less basis in its language for the court's holding that Public Land Order 487 barred mineral leasing.

2. The second difference is the confusion about the effect of Public Land Order 487 created by the terms of the order revoking it. As to the bulk of the lands withdrawn by Public Land Order 487, Public Land Order 1212 provided that the revocation would not become effective "to change the status" of the lands until a prescribed date, and on that date the lands would become subject for a 91-day period to settlement under the homestead laws by veterans or other persons with preference rights (¶ 4, App. 12a–13a). Paragraphs 6 and 7 of the order then provided (in the language of paragraph 6) that:

> Any of the lands * * * then remaining unappropriated, shall become subject to such application, petition, selection, or other form of appropriation by the public generally as may be

> authorized by the public-land laws, *including the mineral leasing laws*, * * * at 10:00 a.m. on the [day following the expiration of the 91-day period]. All applications filed either at or before 10:00 a.m. of such * * * day, *including applications under the mineral-leasing laws*, shall be treated as though simultaneously filed at the hour specified on such day. * * * [Emphasis added.]

In purporting to fix a date on which the lands would "become" subject to mineral leasing, the order seemed to be based on the premise that the lands had not been available for leasing under Public Land Order 487. That premise was, of course, directly contrary both to the Department's consistent interpretation of such withdrawal orders and to its actual leasing practices in the area.[11] Fortunately, the error was promptly perceived, and on October 14, 1955—a bare 35 days after it was promulgated and before it had gone into effect—Public Land Order 1212 was amended to delete the references to mineral leasing in the quoted provision (App. 14a–15a).

One need have only a passing familiarity with human institutions to know that an acknowledgment and correction of an error receives far more careful and deliberate attention than do the myriad details of a long and complex order. The significant thing about that episode, then, is not that the error was made but that it was so unequivocably and promptly corrected, affording a dramatic reaffirmation of the

[11] Lease applications covering substantially the whole area had been accepted for filing, and two leases had actually been issued, while Public Land Order 487 was outstanding. On lease applications filed during that period, the Department has now issued a total of 71 leases covering 124,251 acres.

Secretary's consistent interpretation of Public Land Order 487—his own order—as not forbidding mineral leasing."

III

THE DECISION BELOW SHOULD BE REVERSED ON THE MERITS WITHOUT REACHING THE INDISPENSABLE-PARTIES QUESTION SOUGHT TO BE ARGUED BY THE AMICI CURIAE

As noted in the petition for certiorari (pp. 17–20), there is latent in this case a question whether the Griffin lessees and their assignees were indispensable parties in whose absence the action should have been dismissed. That question was not raised by the Secretary either in the district court or in the court of appeals, but it was sought to be raised on petition for rehearing in the court of appeals—and presumably will be argued here—by the assignees of the lessees who are seeking leave to file briefs as *amici curiae*.

" The court of appeals also quoted another provision of Public Land Order 1212 (¶ 2, App. 12a) which made a permanent withdrawal for recreation purposes of a small part of the area that had been temporarily withdrawn by Public Land Order 487 (R. 84). The language of that withdrawal—"withdrawn from all forms of appropriation under the public-land laws, including the mining but not the mineral-leasing laws"—is quoted presumably to emphasize, by way of contrast with Public Land Order 487, its specific exception of the mineral-leasing laws. But while specificity is always preferable, the fact that some withdrawal orders are explicit in permitting mineral leasing (as some are explicit in forbidding it) does not answer the question of the effect of an order that is silent on the matter.

Whether or not technically barred from doing so,[34] the Secretary, having failed to object to the lack of indispensable parties in either of the lower courts, does not now urge reversal of the judgment below on that ground and—to the extent that the requirement is for the benefit of the defendant—waives any objection to the failure to join the lessees as parties. We offer, in addition, the following reasons why the Court should, if possible, dispose of the case on the merits without noticing the indispensable-parties question argued by the *amici:*

First, the question on the merits, as we have shown, so clearly requires dismissal of the respondents' complaint that the relatively more troublesome question of indispensable parties[35] need not be considered. The

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[34] See Rule 12(h), Fed. R. Civ. P.; *Mastercrafters Clock & Radio Co.* v. *Vacheron & Constantin-Le Coultre Watches, Inc.*, 221 F. 2d 464, 467 (C.A. 2), certiorari denied, 350 U.S. 832; but cf. *Hoe* v. *Wilson*, 9 Wall. 501; *McShan* v. *Sherrill*, 283 F. 2d 462 (C.A. 9); *Brown* v. *Christman*, 126 F. 2d 625, 631 (C.A.D.C.).

[35] Having commented on the indispensable-parties question in the petition, we should note that further study indicates that the question is significantly more complicated than our summary treatment of it there suggests. The view that any person whose interests are importantly affected by a decision must always be made a party is too simplistic, and is belied, for example, by the universal, and never challenged, practice of naming only the agency as the party respondent in proceedings to review orders of administrative agencies, with the interests of the beneficiaries of the challenged orders being represented, unless they move affirmatively to intervene, by the agency. A more discriminating judgment is required, taking into account such factors as the identity of the interests of the present and the absent parties, the nature of the proceedings and of the absent party's interest (perhaps distinguishing, *e.g.*, between a

defect, if any, does not go to the power of the Court to deal with the subject matter, and therefore to the propriety of expressing an opinion on the merits. The situation is similar to *Bourdieu* v. *Pacific Oil Co.*, 299 U.S. 65, 70, where this Court observed:

> Since, plainly, the bill of complaint did not state a cause of action, the United States could have no interest in the case requiring its presence as a party; and the inquiry as to whether it was an indispensable party, which would have been entirely proper under a good bill, was here wholly gratuitous.

For other instances in which the Court has passed over threshold "jurisdictional" questions and disposed of a case on the merits, see *Rabinowitz* v. *Kennedy*, 376 U.S. 605; *Ohio* v. *Helvering*, 292 U.S. 360, 368; *Brooks* v. *Dewar*, 313 U.S. 354, 360. The reasons for doing so are, of course, even stronger when the jurisdictional question has not been raised in, or considered by, the courts below.

Second, it is of great importance that the question on the merits be promptly resolved. By declaring to be a "nullity" any oil and gas lease issued in the circumstances involved here—a category including leases to 862,000 acres[36]—the decision below has cast in

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license and an interest in property), and the like. Compare, *e.g.*, *Brady* v. *Work*, 263 U.S. 435, with *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 300; see generally, Note, 65 Harv. L. Rev. 1050; Developments in the Law, 71 Harv. L. Rev. 879–887, and authorities there cited.

[36] 738,267 acres in the area subject to Executive Order 8979 (p. 13, *supra*) and 124,251 acres in the area subject to Public Land Order 487 (p. 30, n. 32, *supra*). The total of about 917,000 acres given in the petition (Pet. 10–11), included some

doubt the validity of the leases under which substantially all of the oil and gas production in Alaska is now taking place and seriously disrupted the further orderly development of the petroleum resources in the Kenai Moose Range. It was for that reason that we sought, and presumably that the Court granted, certiorari, and it would be unfortunate indeed were this case now to be sidetracked on the indispensable-parties question and leave unsettled the status of the leases covering that vast area of oil-rich lands.

Third, recent developments may limit the importance of a decision of the indispensable-parties question in the posture in which it is presented in this case. At the time it was brought, this suit could be brought only in the District of Columbia, so that it was not possible to join the lessees as parties. Under 28 U.S.C. 1361 and 1391, added in 1962, however, such actions may in our view now be brought in, among other places, the district in which the lands are situated, which would greatly alleviate that problem.[37] In addition, the Advisory Committee on the Rules has recently issued a preliminary draft of pro-

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55,000 acres located in a small part of the Range that was not subject to the withdrawal provisions of either order and was thus unaffected by the decision.

[37] The venue provision, 28 U.S.C. 1391, is in terms applicable only to cases "in which each defendant is an officer or employee of the United States", but that limitation can and should, we think, be interpreted as being satisfied if the only person against whom *relief* is sought is the government official. Certainly there is nothing in the history of the Act to suggest a purpose to prevent the joinder of persons whose interests are consequentially affected but against whom no relief is sought.

posed amendments to the Federal Rules of Civil Procedure which would substitute for the present Rule 19 a totally new provision governing absent parties whose interests would be affected by a judgment and would also amend Rule 12 to conform with that change. See Advance Sheet, 328 F. 2d No. 4, pp. 48–50, 55–59. The result would be to change the existing law governing indispensable parties and to give district courts, and presumably courts of appeals, greater flexibility to deal with situations in which absent parties may be affected by a judgment. Under these circumstances, a decision of the indispensable-parties question in the context of this case would likely be of limited precedential value.

For those reasons, we urge the Court, if possible, to dispose of the case on the merits and not notice the indispensable-parties question argued by the *amici* but not preserved by the Secretary in the courts below.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
WAYNE G. BARNETT,
Assistant to the Solicitor General.
ROGER P. MARQUIS,
EDMUND CLARK,
Attorneys.

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APPENDIX A

Statutes, Orders, and Regulations Involved

1. STATUTES

Sections 1 and 17 of the Mineral Leasing Act of 1920, 41 Stat. 437, as amended by 60 Stat. 950 (30 U.S.C. 181, 226):

> SEC. 1. Deposits of coal, phosphate, sodium, potassium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Appalachian Forest Act approved March 1, 1911 (36 Stat. 961), and those in incorporated cities, towns, and villages and in national parks and monuments, those acquired under other Acts subsequent to February 25, 1920, and lands within the naval petroleum and oil-shale reserves, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to associations of such citizens, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, or in the case of coal, oil, oil shale, or gas, to municipalities. * * *
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> * * * * * *
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> SEC. 17. All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits may be leased by the Secretary of the Interior. When the lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased to the highest responsible qualified

bidder by competitive bidding * * *. When the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under said sections shall be entitled to a lease of such lands without competitive bidding. * * *

2. EXECUTIVE ORDER

Executive Order No. 8979, December 16, 1941 (6 F.R. 6471):

By virtue of the authority vested in me as President of the United States, it is ordered that, for the purpose of protecting the natural breeding and feeding range of the giant Kenai moose on the Kenai Peninsula, Alaska, which in this area presents a unique wildlife feature and an unusual opportunity for the study in its natural environment of the practical management of a big game species that has considerable local economic value, all of the hereinafter-described areas of land and water of the United States lying on the northwest portion of the said Kenai Peninsula, be, and they are hereby, subject to valid existing rights, withdrawn and reserved for the use of the Department of the Interior and the Alaska Game Commission as a refuge and breeding ground for moose for carrying out the purposes of the Alaska Game Law of January 13, 1925, 43 Stat. 739, U.S.C., title 48, secs. 192–211, as amended:

* * * * *

None of the above-described lands excepting Tps. 5 N., Rs. 8, 9, 10, and 11 W., and also excepting a strip six miles in width along the shore of Cook Inlet, extending from a point six miles east of Boulder Point to the point on Kasilof River intersected by said six-mile strip, shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws appli-

cable to Alaska, or to classification and lease under the provisions of the act of July 3, 1926, entitled "An Act to provide for the leasing of public lands in Alaska for fur farming, and for other purposes", 44 Stat. 821, U.S.C., title 48, secs. 360–361, or the act of March 4, 1927, entitled "An Act to provide for the protection, development, and utilization of the public lands in Alaska by establishing an adequate system for grazing livestock thereon", 44 Stat. 1452, U.S.C., title 48, secs. 471–471o: * * *.

3. REGULATIONS AND IMPLEMENTING ORDER

a. As originally issued on October 29, 1947 (12 F.R. 7334), § 192.9 of the Regulations of the Department of Interior (43 C.F.R. 192.9) provided:

> § 192.9 *Leases for wildlife refuge lands.* No noncompetitive oil and gas lease under the act will be issued for lands within a wildlife refuge (a) unless those lands are subjected to an approved cooperative or unit plan, and (b) unless the lease contains a provision which prohibits drilling or prospecting on the refuge lands except when consented to by the Secretary of the Interior upon the advice of the Fish and Wildlife Service. Subject to the same two conditions, competitive leases also may issue for refuge lands. Even if these conditions are not met, competitive leases may nevertheless issue if Fish and Wildlife Service reports that oil and gas development may be conducted without destroying the usefulness of the lands as a sanctuary for wildlife, or, in the absence of such a report, wherever the Secretary determines that the national interest in securing the contemplated oil and gas production outweighs the importance of maintaining the refuge as a sanctuary for wildlife.

b. As revised on December 8, 1955 (20 F.R. 9009), § 192.9 of the Regulations provided:

§ 192.9 *Leasing of wildlife refuge lands.*
(a) Geological and geophysical prospecting permits may be issued by the Fish and Wildlife Service on areas subject to its jurisdiction prior to leasing under such terms and conditions as that Service may prescribe.

(b)(1) Areas determined to be indispensable for the preservation of rare or endangered species, remnant big-game herds, and irreplaceable examples of unique animal or plant ecology are not available for leasing. Areas in this category at present are included in Appendix A. Oil and gas leases may be issued for other lands administered by the Fish and Wildlife Service for wildlife conservation, except that; on those areas designated by the Fish and Wildlife Service as wilderness, recreational, water development, or marsh, with respect to which the Fish and Wildlife Service reports that oil and gas development might seriously impair or destroy the usefulness of the lands for wildlife conservation purposes, no leases will be issued unless a complete and detailed operating program for the area, which will insure full protection of the particular values for which established, is approved by the Director, Fish and Wildlife Service. All pending applications on such excepted wilderness, recreational, water development, and marsh areas will be rejected unless within 6 months the applicant files an operating program sufficient to accomplish these purposes. Areas in this category are listed in Appendix B.

(2) The following conditions shall be expressed in any lease issued under this section:

(i) Geological and geophysical prospecting conducted on the leased premises shall be of a type and at a time satisfactory to the Fish and Wildlife Service.

(ii) No drilling operations shall be conducted under the lease until such lease has been com-

mitted to an approved unit plan. However, the Secretary may, in his discretion, permit or require drilling if he determines that a unit plan including the leased area cannot be secured and that drilling is necessary to protect the interests of the United States.

(*a*) A unit agreement which includes lands administered for wildlife conservation shall contain a provision that no drilling operations may be conducted on the unitized portion of the Government-leased lands administered for wildlife conservation without the consent and approval of the Fish and Wildlife Service as to the time, place, and nature of such operations.

(*b*) In every instance, a plan of development which includes lands administered for wildlife conservation shall not be approved without the concurrence of the Fish and Wildlife Service.

(iii) Lessees shall observe and comply with all State and Federal laws and regulations relating to wildlife and shall take such action as is necessary to assure observance and compliance with these laws and regulations by lessees, employees and agents.

APPENDIX A—FISH AND WILDLIFE SERVICE LANDS NOT AVAILABLE FOR LEASING

* * * * *

APPENDIX B—FISH AND WILDLIFE SERVICE LANDS AVAILABLE FOR LEASING UNDER A SATISFACTORY DEVELOPMENT AND OPERATING PLAN

* * * * *

Kenai: The following areas and all lands within one mile of Tustemena Lake, Skilak Lake, Kenai River, Upper and Lower Russian Lake and River Hidden Lake, Kasilof River, and Chickaloon Flats.

* * * * *

c. As revised on January 8, 1958 (23 F.R. 227) and

now in force (43 C.F.R. 192.9 (1963)), § 192.9 of the Regulations provides:

> § 192.9 *Leasing of wildlife refuge lands, game range lands and coordination lands*—(a) *Definitions*—(1) *Wildlife refuge lands.* Such lands are those embraced in a withdrawal of public domain and acquired lands of the United States for the protection of all species of wildlife within a particular area. Sole and complete jurisdiction over such lands for wildlife conservation purposes is vested in the United States Fish and Wildlife Service even though such lands may be subject to prior rights for other public purposes or, by the terms of the withdrawal order, may be subject to mineral leasing.
>
> (2) *Game range lands.* Game ranges created by a withdrawal of public lands and reserved for dual purposes, namely protection and improvement of the public grazing lands and natural forage resources and conservation and development of natural wildlife resources, are under the joint jurisdiction of the Bureau of Land Management and the United States Fish and Wildlife Service.
>
> (3) *Coordination lands.* These lands are withdrawn or acquired by the Government and made available to the States by cooperative agreements entered into between the United States Fish and Wildlife Service and the game commissions of the various States, in accordance with the act of March 10, 1934 (48 Stat. 401), as amended by the act of August 14, 1946 (60 Stat. 1080), or by long-term leases or agreements between the Department of Agriculture and the game commissions of the various States pursuant to the Bankhead-Jones Farm Tenant Act (50 Stat. 525), as amended, where such lands were subsequently transferred to the Department of the Interior, with the United States Fish and Wildlife Service as the custodial agency of the Government.

(4) *Alaska wildlife areas.* Such lands are areas in Alaska created by a withdrawal of public lands for the management of natural wildlife resources and administered by the United States Fish and Wildlife Service.

(b) *Leasing policy and procedure.* (1) No offers for oil and gas leases covering wildlife refuge lands will be accepted and no leases covering such lands will be issued except as provided in subparagraph (2) of this paragraph.

(2) In instances where it is determined by the Geological Survey that any of the lands mentioned in paragraph (a)(1), or any of the lands mentioned in paragraph (a) (2), (3) and (4) of this section and defined in this section as not available for leasing are subject to drainage, the Bureau of Land Management, with the concurrence of the United States Fish and Wildlife Service, will process an offering inviting competitive bids in accordance with the then existing regulations relating to competitive oil and gas leasing. Such leases shall be issued only upon approval by the Secretary of the Interior and shall contain such stipulations as are necessary to assure that leasing activities and drilling shall be carried out in such a manner as will result in a minimum of damage to wildlife resources.

(3) As to game range lands and Alaska wildlife areas, representatives of the appropriate office of the Bureau of Land Management and the United States Fish and Wildlife Service will confer for the purpose of entering into an agreement specifying those lands which shall not be subject to oil and gas leasing. No such agreement shall become effective, however, until approved by the Secretary of the Interior. As to coordination lands, representatives of the Bureau of Land Management and the United States Fish and Wildlife Service will, in cooperation with the authorized members of the

various State game commissions, confer for the purpose of determining by agreement those lands which shall not be subject to oil and gas leasing.

(4) The remaining lands in paragraph (a) (2) and (4) of this section not closed to oil and gas leasing will be subject to leasing on the imposition of such stipulations agreed upon by the Fish and Wildlife Service and the Bureau of Land Management. The remaining lands in paragraph (a)(3) of this section not closed to oil and gas leasing will be subject to leasing on the imposition of such stipulations agreed upon by the State Game Commission, the United States Fish and Wildlife Service, and the Bureau of Land Management.

(c) *Publication and filing of agreements; filing of lease offers.* The agreements referred to in paragraph (b)(3) of this section shall be published in the Federal Register and shall contain a description of the lands affected thereby which are not subject to oil and gas leasing, together with a statement of the stipulations agreed upon by the parties thereto for inclusion in such leases to assure that all operations under the lease shall be carried out in such a manner as will result in a minimum of damage to wildlife resources. The agreements, as supplemented by maps or plats specifically delineating the lands will be filed in the appropriate land offices of the Bureau of Land Management where they may be inspected by the public at the usual hours specified for that purpose. Lease offers for such lands will not be accepted for filing until the tenth day after the agreements and supplemental maps or plats are noted on the land office records.

(d) *Suspension of pending applications.* All pending offers or applications heretofore filed for oil and gas leases covering game ranges, coordination lands, and Alaska wildlife areas, will continue to be suspended until the agree-

ments referred to in paragraph (b)(3) of this section shall have been completed.

(e) *Lands in requested withdrawal.* All existing offers or applications for oil and gas leases covering lands included in requests for withdrawals for wildlife refuges, game ranges, coordination lands or Alaska wildlife areas, as defined herein, shall be suspended until after the consummation of the withdrawal, and thereafter such offers shall be considered in accordance with the provisions of this section.

d. The Order of the Secretary of the Interior published in the Federal Register of August 2, 1958 (23 F.R. 5883) provides in pertinent part:

> Notice is hereby given that, pursuant to the regulation 43 CFR, 192.9 (Circular 1990), agreement as reflected by the map herein referred to, has been consummated between the Bureau of Land Management and the United States Fish and Wildlife Service of this Department, designating those lands within the Kenai National Moose Range on the Kenai Peninsula, Alaska, which are hereby closed to oil and gas leasing because such activities would be incompatible with management thereof for wildlife purposes. The lands excluded from leasing are specifically delineated on the map of the Kenai National Moose Range, set forth below, which was approved on January 29, 1958, and are identified on said map as follows:
>
> *Closed area.* The following described lands within the boundaries of the Kenai National Moose Range, Alaska, are not opened to oil and gas leasing:
>
> [Description omitted; essentially the southern half of the Range.]
>
> The balance of the lands within the Kenai National Moose Range are subject to the filing of oil and gas lease offers in accordance with the provisions of the Mineral Leasing Act of

1920, as amended (41 Stat. 437), and the regulations in 43 CFR, Part 192 and the provisions hereof. Offers to lease covering any of these lands which have been pending and upon which action was suspended in accordance with the regulation 43 CFR 192.9(d) will now be acted upon and adjudicated in accordance with the regulations.

All offers to lease must be submitted on Form 4–1158 and in accordance with the regulation 43 CFR 192.42, accompanied by a $10 filing fee and the advance first year's rental of 50 cents per acre in accordance with the provisions of Public Law 85–505 enacted July 3, 1958.

In accordance with the regulation 43 CFR 192.9 (Circular 1990), lease offers for lands which have not been excluded from leasing will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office of the Bureau of Land Management in Anchorage, Alaska. All lease offers filed in that office on that day and until 10 a.m., on the tenth day thereafter will be treated as having been filed simultaneously. The priorities of all offers which conflict in whole or in part will be determined in accordance with the procedure outlined in the regulation 43 CFR 295.8.

All leases will be subject to the special stipulations (Form 4–1383) approved April 18, 1958 and published in the Federal Register April 22, 1958 (23 F.R. 2636, 2637).

FRED A. SEATON,
Secretary of the Interior.

July 24, 1958.

APPENDIX B

Orders Involved Solely as to Respondent Coyle

1. Public Land Order No. 487, June 16, 1948 (13 F.R. 3462):

> By virtue of the authority vested in the President by the act of June 25, 1910, c. 421, 36 Stat. 847, as amended by the act of August 24, 1912, c. 369, 37 Stat. 497 (U.S.C. Title 43, secs. 141–143), and pursuant to Executive Order No. 9337 of April 24, 1943, it is ordered as follows:
>
> Subject to valid existing rights, the public lands within the following-described areas in Alaska are hereby temporarily withdrawn from settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation:
>
> * * * * *
>
> [Description omitted; includes, *inter alia,* most of the lands in the Kenai National Moose Range that were excepted from Executive Order No. 8979, pp. 2a–3a, *supra.*]
>
> * * * * *

2. Public Land Order No. 1212, September 9, 1955 (20 F.R. 6795):

> By virtue of the authority vested in the President by Section 1 of the act of June 25, 1910 (36 Stat. 847; 43 U.S.C. 141), and otherwise, and pursuant to Executive Order No. 10355 of May 26, 1952, it is ordered as follows:

1. Public Land Order No. 487 of June 16, 1948, which temporarily withdrew the following-described land from settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation, which was partially revoked by Public Land Orders No. 558, 653, 751, 778, 800, 812, 820, 839, 977, 1006, and 1020 is hereby revoked in its entirety: [description omitted; 160,974 acres.]

2. Subject to valid existing rights, the following-described lands are hereby withdrawn from all forms of appropriation under the public-land laws, including the mining but not the mineral-leasing laws, and reserved under the jurisdiction of the Bureau of Land Management, Department of the Interior, for recreational purposes: [description omitted; 568 acres.]

3. The status of the following-described lands shall not be changed until it is so provided by [a future order] * * *: [description omitted; 1,676 acres.]

4. This order shall not otherwise become effective to change the status of the remaining lands until 10:00 a.m. on the 35th day after the date of this order. At that time the said lands shall become subject to settlement, application, petition and selection, as follows:

For a period of 91 days commencing at the date and on the hour hereinafter specified, the following-described public lands released from withdrawal by paragraph 1 of this order shall, subject to valid existing rights and the provisions of existing withdrawals, become subject * * * to application as indicated, and to the indicated form of appropriation only by qualified veterans of World War II, the Korean Conflict and by other qualified persons entitled to preference under the act of September 27, 1944 (58 Stat. 747; 43 U.S.C. 279–284) as amended, subject to the requirements of applicable law * * *:

(a) At 10:00 a.m. on the 35th day after the date of this order, to application under the

homestead laws only: [description omitted; 4,327 acres.]

(b) At 10:00 a.m. on the 63d day after the date of this order, to application under the homestead laws only: [description omitted; 4,543 acres.]

(c) At 10:00 a.m. on the 91st day after the date of this order, to settlement under the homestead laws or the Alaska Home Site Act of May 26, 1934 (48 Stat. 809; 48 U.S.C. 461) or the Small Tract Act of June 1, 1938 (52 Stat. 609, 43 U.S.C. 682a) as amended:

> The unsurveyed public lands released from withdrawal by paragraph 1 of this order, and not otherwise rewithdrawn or restored.

(d) At 10:00 a.m. on the 91st day after the date of this order, to application under the homestead laws or the Alaska Home Site Act of May 28, 1934 (48 Stat. 809; 48 U.S.C. 461) or the Small Tract Act of June 1, 1938 (52 Stat. 609; 43 U.S.C. 682a) as amended:

> The surveyed public lands released from withdrawal by paragraph 1 of this order and not otherwise restored by paragraphs 4(a) or 4(b), or described in paragraph 3.

* * * * *

6. Any of the lands described in paragraphs 4(a), 4(b) or 4(d) of this order then remaining unappropriated, shall become subject to such application, petition, selection, or other form of appropriation by the public generally as may be authorized by the public-land laws, including the mineral-leasing laws, as follows:

(a) As to the lands described in paragraph 4(a), at 10:00 a.m. on the 126th day after the date of this order.

(b) As to the lands described in paragraph 4 (b), at 10:00 a.m. on the 154th day after the date of this order.

(c) As to the lands described in paragraph 4(d), at 10:00 a.m. on the 182nd day after the date of this order.

All applications filed either at or before 10:00 a.m. of such 126th, 154th, or 182nd day, including applications under the mineral-leasing laws, shall be treated as though simultaneously filed at the hour specified on such day. All applications, including applications under the mineral-leasing laws, filed under this paragraph after such 126th, 154th, or 182nd day, shall be considered in the order of filing. Mining locations made prior to such 126th, 154th, or 182nd day, as the case may be, shall be invalid.

7. Commencing at 10:00 a.m. on the 182nd day after the date of this order, any of the unsurveyed lands described in paragraph 4 (c) not settled upon by veterans or other persons entitled to credit for service shall become subject to settlement and other forms of appropriation by the public generally, including leasing under the mineral-leasing laws in accordance with appropriate laws and regulations. All applications, including applications under the mineral-leasing laws, filed either at or before 10:00 a.m. of such 182nd day, shall be treated as though simultaneously filed at the hour specified on such 182nd day. All applications, including applications under the mineral-leasing laws, filed under this paragraph after such 182nd day shall be considered in the order of filing. Mining locations made prior to such 182nd day shall be invalid.

* * * * *

3. Amendment to Public Land Order No. 1212, October 14, 1955, 20 F.R. 7904:

Paragraphs No. 6 and 7 of Public Land Order No. 1212 of September 9, 1955, appearing as Doc. 55-7464 in 20 F.R. 6795 of the issue of September 15, 1955, are hereby amended by deleting therefrom the phrases "in-

cluding the mineral leasing laws", "including applications under the mineral leasing laws" and "including leasing under the mineral leasing laws," wherever they appear, and by adding after the words "mining locations" in the last sentence of paragraphs 6 and 7 of the order the words "for non-metalliferous minerals."

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